UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
BASIC RESEARCH, LLC A.G. WATERHOUSE, LLC KLEIN-BECKER USA, LLC NUTRASPORT, LLC SOVAGE DERMALOGIC LABORATORIES, LLC BAN, LLC d/b/a BASIC RESEARCH, LLC OLD BASIC RESEARCH, LLC, BASIC RESEARCH, A.G. WATERHOUSE, KLEIN-BECKER USA, NUTRA SPORT, and SOVAGE DERMALOGIC LABORATORIES DENNIS GAY DANIEL B. MOWREY d/b/a AMERICAN PHYTOTHERAPY RESEARCH LABORATORY, and MITCHELL K. FRIEDLANDER, Respondents.	)	Docket No. 9318

ORDER ON COMPLAINT COUNSEL'S MOTION TO COMPEL A DOCUMENT FROM RESPONDENTS' TESTIFYING EXPERT SOLAN

I.

On December 13, 2004, Complaint Counsel filed a motion to compel production of a document that was in the possession of Respondents' testifying expert Lawrence Solan ("Motion"). On December 27, 2004 and again on December 30, 2004, Respondents filed unopposed motions to extend the time to respond to Complaint Counsel's motion. The two motions for extension of time to file an opposition are **GRANTED**. On January 7, 2005, Respondents filed their opposition ("Opposition"). For the reasons set forth below, Complaint Counsel's motion to compel is **GRANTED**.

II.

Complaint Counsel seeks an order compelling production of a document created by Respondents' counsel which summarized a meeting between various counsel for Respondents, Solan, and another potential expert. Motion at 1, 6. Complaint Counsel contends that this document falls within the specifications of the subpoena *duces tecum* issued to Solan and the specifications of Complaint Counsel's second request for production of documentary materials and tangible things. Motion at 1. Respondents listed the document on a privilege log and produced a significantly redacted copy of the document. Motion at 1.

Complaint Counsel argues that it is entitled to the document because it falls within the scope of discovery applicable to testifying experts; and Solan's refusal to produce a relevant email attachment that he received, read, and maintained during the time that he was formulating his expert opinions in this case is unjustified. Motion at 4-8. Respondents contend that Solan did not consider the document in reaching his opinions; and counsel's mental impressions, opinions, and legal theories are protected by the work product privilege even if disclosed to and considered by a testifying expert. Opposition at 3-8.

III.

Solan is a testifying expert. The court in *Dura Lube* clarified the law regarding the disclosure of expert testimony and information, concluding that all data, documents, or information considered by a testifying expert witness in forming the opinions to be proffered in a case is discoverable. *In re Dura Lube*, 1999 FTC LEXIS 254, at *6 (Dec. 15, 1999) (citing Fed. R. Civ. Pro. 26(a)(2)(B); 16 C.F.R. § 3.31(c)(4)(B); *Thompson Med. Co.*, 101 F.T.C. 385, 388 (Mar. 11, 1983)). Full disclosure of the basis for an expert's opinion ensures the independence of the expert's conclusions. *Dura Lube*, 1999 FTC LEXIS 254, at *6; *Barna v. United States*, 1997 U.S. Dist. LEXIS 10853, at *7-8 (N.D. Ill. 1997). Therefore, for each expert expected to testify at trial, the parties must exchange all documents reviewed, consulted, or examined by the expert in connection with forming his or her opinion on the subject on which he or she is expected to testify, regardless of the source of the document or whether a document was originally generated in another investigation or litigation. *Dura Lube*, 1999 FTC LEXIS 254, at *6-7; *see also In re Shell Oil Refinery,* 1992 U.S. Dist. LEXIS 4896, at *2 (E.D. La. 1992). The scope of discovery is not limited to documents relied on by the expert in support of his or her opinions, but extends to documents considered but rejected by the testifying expert in reaching those opinions. *United States v. City of Torrance*, 163 F.R.D. 590, 593-94 (C.D. Cal. 1995). Any document considered by an expert in forming an opinion, whether or not such document constitutes work product or is privileged, is discoverable. *Dura Lube*, 1999 FTC LEXIS, 254, at *8; *Musselman v. Phillips*, 176 F.R.D. 194, 199 (D. Md. 1997); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 63 (S.D.N.Y. 1997); *Karn v. Rand Ingersoll*, 168 F.R.D. 633, 639 (N.D. Ind. 1996).

The issue raised by the current motion is whether the work product doctrine was waived by disclosure of the document to a testifying expert. The federal district courts have been divided on this issue. *Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 644, 646 (S.D. Ind. 2000); *Barna*, 1997 U.S. Dist. LEXIS 10853, at *2, *4 n.1. However, "to the extent that one can discern trends in caselaw, it appears . . . that the present weight of the caselaw tends to be in favor of allowing discovery of core attorney work product materials which have been considered by an expert." *Suskind v. Home Depot Corp.*, 2001 U.S. Dist. LEXIS 1349, *15-16 (D. Mass. 2001). Indeed, recent cases in the Second Circuit state that the "'overwhelming weight of authority in this Circuit . . . indicates that the Rule 26(a)(2)(B) disclosure requirement trumps the substantial protection otherwise accorded opinion work product under Rule 26(b)(3).'" *Ling Nan Zheng v. Liberty Apparel Co.*, 2004 U.S. Dist. LEXIS 15026, at *5 (S.D.N.Y. 2004) (*quoting Aniero Concrete Co. v. N.Y. City Sch. Constr. Auth.*, 2002 U.S. Dist. LEXIS 2892, at *8 (S.D.N.Y. 2002)).

Courts which advocate a bright line rule that work product protection does not apply to documents provided to testifying experts rely on the text of Federal Rule of Civil Procedure 26(a)(2)(B) which requires experts to provide a report including "the data or other information considered by the witness in forming the opinions [to be expressed]" and the advisory committee notes which indicate that "litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Fed. R. Civ. Pro. 26(a)(2)(B); *see also Karn*, 168 F.R.D. at 635, 638. Courts have also indicated that the policy grounds supporting this bright line rule include: effective cross examination of the expert witness on attorney influence, the policy underlying the work product doctrine, and certainty in litigation. *TV-3, Inc. v. Royal Ins. Co. of Am.*, 194 F.R.D. 585, 588 (S.D. Miss. 2000); *Karn*, 168 F.R.D. at 639-40.

The reasoning which supports imposition of a bright line rule that work product protection does not apply to documents provided to testifying experts applies with full force to the situation presented by Complaint Counsel's motion. Respondents indicate that the document summarizing the meeting of counsel and experts includes mental impressions, opinions, and legal theories. Opposition at 1-2. Once these impressions, opinions, and theories are shared with the experts hired to provide expert testimony during trial, those impressions, opinions, and theories are subject to discovery. To fully evaluate the expert testimony, the fact finder may consider attorney input that may have influenced the opinions of the expert. This rule is consistent with the statement in *Dura Lube* that "[a]ny document considered by an expert in forming an opinion, whether or not such document constitutes work product or is privileged, is discoverable." *Dura Lube*, 1999 FTC LEXIS, 254, at *8.

Respondents' arguments that Solan did not consider the document are similarly unavailing. Solan testified in his deposition that he "read [the document] casually," "looked at it," and "kept it." Motion, Exhibit E, at 47-48. Courts have specifically rejected the argument that there is a distinction between documents "relied upon" by the expert and documents

"reviewed" by the expert. *Simon*, 194 F.R.D. at 647; *Karn*, 168 F.R.D. at 635. From Solan's deposition, it is clear that Solan considered the document within the meaning of Federal Rule of Civil Procedure 26(a)(2)(B). Accordingly, a copy of the document that is not redacted shall be provided to Complaint Counsel.

IV.

For the above-stated reasons, Complaint Counsel's motion to compel is **GRANTED**. Respondents shall provide to Complaint Counsel a copy of the document that is not redacted within three days of the date of this Order. Respondents shall make Solan available for deposition within ten days of the date of this Order on issues directly related to the document and the meeting that is summarized in the document. Consistent with this Order, Solan shall not be instructed not to answer questions about the meeting and document. Complaint Counsel may reopen the depositions conducted in January 2005, as requested in the second unopposed motion for extension, for the limited purpose of posing questions about the meeting and document that are the subject of this Order.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: January 19, 2005